IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 5005 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GSCC Ltd. SERVED THRO'MANAGING DIRECTOR

Versus

KAMAL CONSTRUCTION CO,

Appearance:
1. First Appeal No. 5005 of 2001
MR KG SUKHWANI for Petitioner No. 1
..... for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 21/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE Y.B.BHATT)

1. This is an appeal under Sec. 96 of the Civil Procedure Code filed by the Gujarat State Construction Corporation Ltd. challenging the judgment and decree passed by the 6th Jt.Civil Judge (S.D.), Bharuch in Special Civil Suit no. 45/94, whereby the corporation's suit, as the plaintiff, was dismissed.

2. The plaintiff-appellant had filed a suit against the defendant-respondent to recover damages quantified in the sum of Rs.74,68,554.60 ps., as damages sustained by the appellant-plaintiff on account of the breach of contract on the part of the defendant, and also on account of the fact that the abandonment of the contract on the part of the defendant required the plaintiff to entrust the unfinished work to another contractor at higher rates and higher consequential expenditure.

3. The trial court examined the relevant pleadings of the parties, framed the appropriate issues and after appreciating the evidence on record, came to the conclusion by recording the appropriate findings to the effect that the plaintiff had proved that the defendant had committed breach of contract, that the plaintiff failed to prove that it has suffered a loss of Rs.46,09,980/- on account of such breach of contract, that the plaintiff failed to prove that the defendant is liable to pay compensation to the plaintiff in the sum of Rs.74,68,554.50 ps., that the plaintiff failed to prove that the defendant is liable to pay interest on the said sum of damages @ 22%, and that the suit was time-barred. On the basis of the aforesaid findings, the trial court dismissed the suit of the plaintiff-appellant.

4. We have heard learned counsel for the appellant, carefully perused the impugned judgment and we have also looked into such evidentiary material on record to which our attention had been drawn.

5. As a result of this exercise, we are of the opinion that the judgment and decree passed by the trial court is eminently sustainable and does not justify interference by way of the present appeal. This appeal is therefore, liable to be dismissed.

6. Only a few salient features require to be noted. It is not necessary to discuss here the various factual findings on the basis of which the trial court has rejected the plaintiff's claim for damages neither is it necessary to discuss the facts on which the trial court found that the plaintiff is not entitled to damages

to the extent of the amount claimed.

6.1 We may confine our attention to the crux of the matter namely the question of limitation. The trial court found that the plaintiff's suit was governed by Article 55 of the Limitation Act, 1963 whereas the learned counsel for the appellant-plaintiff contended that it would be Article 112 which would apply.

6.2 Article 55 of the said Act contemplates a suit "for compensation for the breach of any contract, express or implied, not herein specifically provided for". There is no dispute that the plaintiff's suit for damages and compensation was specifically based on the averment that it was the defendant who had committed the breach of contract and that therefore the appellant-plaintiff was entitled to compensation for such breach. The limitation prescribed under Article 55 is 3 years. As against this, learned counsel for the appellant contended that the limitation of 30 years would be available to the plaintiff, if Article 112 is applied to the facts of the case. Article 112 certainly prescribes a period of limitation of 30 years, but that pertains to "a suit by or on behalf of the Central Government or any State Government."

6.3 Thus, the appellant would have to satisfy the court that it is a suit by or on behalf of the State Government.

6.4 The learned counsel for the appellant in this context contended that the appellant is a Government Company within the meaning of the Companies Act, that all the directors thereof are Government Officers and/or nominees of the Government, that the entire share capital has been subscribed by the Government and that therefore it should be deemed in law to be the same as or equivalent to "the State Government" for the purpose of Article 112 of the Limitation Act. In the context of this submission, we must first note that the factual averments made in this context and noted by us in the previous paragraphs have been accepted by us only for the purpose of considering the arguments advanced in this context, although such factual averments have not been proved by producing any evidence on record. Therefore, we are not in a position to hold, on the basis of evidentiary material on record, that the directors of the plaintiff-company are Government Officers, that the company is solely owned by the State Government, and/or that the directors are Government nominees, that the entire share capital has been contributed by the State

Government etc. However, even assuming for the sake of argument that these averments are factually correct, it would not be possible for the court to hold that the appellant-company is "the State Government" within the meaning of Article 112 of the Limitation Act.

6.5 As aforesaid, even assuming that such factual averments are correct, at best the appellant-company may be able to urge that it is "the State " within the meaning of Article 12 of the Constitution. However, this fact situation or even the situation in law would not necessarily confer upon the appellant-company the status of "the State Government" within the meaning of Article 112. The reasons for this conclusion are equally obvious. Firstly, it could not be said and in fact it is not even urged by the learned counsel for the appellant, that the appellant-company is a creature of the statute i.e. set up by or under any State Legislation. Further more, it is not even urged and in fact could not be urged that the appellant-company performs any function of the State Government. Taken in the widest sense, the function of the Government is "to govern", and certainly the appellant-company does not profess to have been set up or to have been created or to have been constituted to perform the functions of Government.

6.6 We may only observe in passing, that we have looked into certain other material urged upon us by learned counsel for the appellant, in order to satisfy the conscience of the court, while being conscious that it is not on the record of the case and proved as evidence.

6.7 Some of such material includes a resolution of Government of Gujarat in the Public Works Department dated 8.1.75, a Note of the creation of Gujarat State Construction Corporation Ltd., and the Memorandum and the Articles of Association of the appellant-company. On a collective reading of this material we find, firstly, that the appellant-company cannot possibly be said to have been set up or entrusted with the functions of the State Government or of the Public Works Department. On the contrary, the resolution referred to hereinabove, contemplates that the company has been set up to handle such nature and character of the work, which was till then entrusted to the State P.W.D., but which the P.W.D. could not handle for various reasons considered in the said resolution. The resolution further contemplates that the appellant-company may also undertake other work on a contract basis from the Irrigation Department, the Road and Bridges Department and Public Works Department.

The Note to the said Resolution referred to hereinabove also contemplates that the equipment and other assets which may be required by the company for the performance of its functions may be spared by the Public Works Department (Irrigation section), but the financial arrangements for the transfer of such equipment shall be worked out later. The very same note contemplates that such equipment can probably be lent on hire or may be outright transferred to the company at depreciated cost. This provision itself indicates that the State Government, when it set up the appellant-company, did not treat the company as a part of the Government or in any way equivalent to the P.W.D. or Irrigation Department. Further more, the same Note also contemplates that additional funds which the company may require as working capital and for additional equipment may be obtained by the company by borrowing from banks and other financial institutions and if need be, from the Government in the shape of interest bearing loans.

7. Apart from the aforesaid factors, we have no hesitation in holding that the appellant-company is an independent legal entity with a corporate identity, being a Corporation sole with its own seal.

7.1 The next question which requires consideration is whether the appellant-company, having a separate and distinct identity and not being the State Government, can be said to have filed the suit "on behalf of the State Government", so as to be covered by Article 112 of the Limitation Act. On the facts of the case, there is no controversy that the plaintiff had entered into a contract with the defendant on its own account and not on behalf of the State Government. There is no dispute that the contract was to be performed by the defendant for the purpose of the plaintiff-company and not for the purpose of the State Government. There is also no dispute that the payment to be made, or which payment was to have been made, would come from the funds of the plaintiff-company and not from the funds of the State Government. It is also clear from the pleadings and averments in the plaint that the damages which are claimed to have been suffered by the plaintiff-company are suffered on its own account and that such losses and damage have not been suffered by the State Government. In short, therefore, the plaintiff-company cannot legitimately contend that the suit has been filed for/on behalf of the State Government. Even otherwise, this submission on behalf of the appellant would not bear scrutiny in as much as the plaintiff has not even indirectly mentioned in the plaint that the suit is filed for/on behalf of the State

Government. Even if such an averment or assertion had found place in the plaint, that by itself would not have served the purpose, in as much as no legal action can be taken by any agency purporting to act for and on behalf of the State Government unless such agency has been specifically authorized in fact or in law. No such authorization is proffered or purported to have been granted in favour of the plaintiff-appellant. On these facts, we can only find that the appellant-plaintiff had not filed the suit for and on behalf of the State Government.

8. Even otherwise on the facts of the case, it is contended on behalf of the appellant that even if Article 55 of the Limitation Act is found to apply, the suit should be found to have been filed within the prescribed period of 3 years. When if we examine this contention on the facts of the case, the same cannot be justified. There is no dispute that a work order was issued in favour of the defendant, that he had commenced work on the contract entered into between the parties, but the progress of such work did not progress satisfactorily after some time. It is the specific case of the appellant-plaintiff that the defendant stopped the work and also abandoned the contract on a specified date viz. 15.6.90. There is specific evidence on record that at least two notices were issued by the plaintiff to the defendant to resume work failing which the contract would be terminated and/or other action taken. Even after the issuance of at least two notices, specific reliance is placed on the third notice viz. exh. 42 which is referred to as the final notice by the appellant, dated 25.2.91. This so called final notice is relied upon by the plaintiff to indicate that it was on the date of this final notice that the plaintiff could have been deemed to have knowledge that defendant had abandoned the contract and/or that the plaintiff is likely to suffer damage or loss in case this final notice was not complied with. Reliance is also placed upon exh. 44 which is dated 26.4.91, and is stated to be an intimation by the plaintiff to the defendant terminating the contract between the parties. On the basis of this material on record, it is contended that the suit filed on 28.2.94 must be deemed to be within the prescribed period of limitation of 3 years.

8.1 Even this contention cannot be accepted in as much as, according to the appellant-plaintiff, the suit is within 3 years only if computed from the date of exh. 44, which is the termination of the contract by communication from the plaintiff to the defendant.

However, this is only the averment made in the plaint and before us. However, if we regard the cause of action as commencing from the date of the final notice issued by the plaintiff at exh. 42, the suit is obviously time-barred. Even otherwise, we are of the opinion that the appellant-plaintiff has specifically averred, not only in the plaint but also in the correspondence before filing of the suit, that the defendant had left the work and abandoned the contract on 15.6.90. Thus, when the suit is filed for damages arising from the breach of contract on a day which is specifically identified by the plaintiff, limitation would obviously begin from that date. Thus, if 15.6.90 is regarded to be the date on which the defendant abandoned the contract, as asserted by the plaintiff, the suit is again time-barred.

9. Learned counsel for the appellant also sought to contend that the civil court had no jurisdiction in view of certain provisions of Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992. It must be distinctly understood that the appellant seeks to contend before us that the civil court wherein the suit was filed had no jurisdiction to entertain the suit. This contention must be examined in the light of the fact that the appellant itself was the plaintiff which chose to file a suit before the trial court. As per the specific averment made in the plaint, the trial court had jurisdiction to entertain and decide the suit. Thus, when learned counsel for the appellant contends before this court that the trial court had no jurisdiction, this is a contention which is specifically contrary to the specific pleading and averment made in the plaint. Apart from this, the contention now raised before us was not a contention raised before the trial court. The trial court, therefore, had no opportunity to decide such a contention, in the light of the facts and evidence on record. Even otherwise, the question of jurisdiction is a mixed question of fact and law and cannot be permitted to be raised for the first time in appeal. Even otherwise, we are of the opinion that the plaintiff who invokes the jurisdiction of a court, leads evidence in support of the claims made before that court, pleads and argues on the basis of the suit claims and the evidence on record, takes a chance of obtaining a favourable decision from that court, cannot then be permitted to turn around and contend that that court had no jurisdiction. This view has been specifically expressed by the Supreme Court in case of Municipal Commissioner, Calcutta V/s Saleek Kumar Banerjee reported in 2000(4) S.C.C. 108 following the decision in the case of Narhari Shivram Shet Narvekar V/s Pannalal Umediram reported in

1976(3) S.C.C. 203.

10. In light of the aforesaid discussion, we are of the opinion that there is no substance in the present appeal and the same is therefore dismissed.

(Y.B.BHATT, J)

(SHARAD D DAVE, J)

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